

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CRIMINAL NO. 15-4268 KG

ANGEL DeLEON, et al.,

Defendants.

and

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CRIMINAL NO. 15-4275 KG

CHRISTOPHER GARCIA,

Defendant.

TRANSCRIPT OF SHOW CAUSE HEARING AND MOTIONS HEARING

BEFORE THE HONORABLE KENNETH J. GONZALES

TUESDAY, MARCH 22, 2016; 1:25 P.M.

LAS CRUCES, NEW MEXICO 88001

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15 Also Present: Mr. Bryan Acee, FBI
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1 THE COURT: Okay. Good afternoon, everyone. Please
2 be seated.

3 Okay. We are on the record in open court in United
4 States versus Eugene Martinez. That's 15-CR-4268. And that
5 also includes United States versus Christopher Garcia, same
6 cause number, in addition, 15-CR-4275.

7 Ms. Maria Armijo is here for the United States.

8 Good afternoon, Ms. Armijo.

9 MS. ARMIJO: Good afternoon, Your Honor.

10 THE COURT: All right. And representing Mr. Martinez
11 is Mr. Robert Gorence.

12 MR. GORENCE: Good afternoon, Your Honor.

13 THE COURT: Good afternoon to you, Mr. Gorence.

14 MR. GORENCE: And Mr. David Lane is on the line.

15 THE COURT: Yes. Okay. And I have also Ms. Amy
16 Sirignano, who appears on behalf of Mr. Garcia.

17 All right. Mr. Garcia, you may sit down, sir.

18 And I also see Mr. Martinez is here. And Mr. David
19 Lane is on the telephone.

20 Can you hear me sufficiently, Mr. Lane?

21 MR. LANE: I can, Your Honor, yes.

22 THE COURT: Okay. Good afternoon to you, sir.

23 MR. LANE: Good afternoon, Your Honor.

24 THE COURT: Okay. I had called this matter by order
25 to show cause relating to whether counsel, Mr. Gorence, would

1 remain on the case in light of his prior representation of
2 Mr. Garcia, and while that order was pending, the United States
3 filed a motion seeking recusal -- or disqualification, rather,
4 of Mr. Gorence, and that is document 306. I set the matter for
5 a hearing, and during the course of that hearing I heard from
6 Mr. Gorence and Ms. Armijo as well as Ms. Sirignano, and, of
7 course, allowed Mr. Gorence to file a written pleading on
8 behalf of Mr. Martinez, addressing -- in part responding to the
9 Government's motion and addressing my order to show cause.

10 So that brings us to this hearing today, where I will
11 hear from Mr. Gorence to the extent you'd like to add anything.

12 MR. GORENCE: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. GORENCE: You have the benefit of document 319
15 that I filed in response to the Government's sealed motion
16 seeking disqualification. My position is really set forth in
17 this response.

18 I first believe I do not have a conflict of interest
19 to begin with, and that really flows from what happened when I
20 was first asked to accept an appointment for Mr. Martinez. I
21 had seen the Indictment, I had received a call from
22 Mr. Garcia's mother the day that he was arrested, and I
23 indicated that I would not be representing him -- they could
24 not retain me in a case of this complexity and it wasn't going
25 to work out. So I knew Mr. Garcia was a defendant joined with

1 Mr. Martinez.

2 Prior to accepting appointment, as I told you during
3 our telephonic hearing, I did check the rules of professional
4 conduct and did research, consulted with two other lawyers to
5 make sure -- and I should say, not even the lawyers in my
6 firm -- outside counsel to ascertain that my undertaking this
7 matter on behalf of Mr. Martinez was conflict-free.

8 And as I've posited, I mean, it's very clear from the
9 model Rules of Professional Conduct at Rule 1.9(a), I do not
10 have a conflict in this matter when -- and I can read it: "A
11 lawyer who has formally represented a client in a matter shall
12 not thereafter represent another person in the same or
13 substantially related matter in which that person's interests,"
14 that would be Mr. Martinez, "are materially adverse to the
15 interests of the former client unless" the former client gives
16 informed consent.

17 Well, and there's guidance on what is a -- if you
18 look at the restatement of the law governing lawyers, what
19 actually is a matter that is substantially related. And as
20 I've set forth in my response, representing Mr. Garcia in a
21 2006 matter involving a felon-in-possession does not relate to
22 these allegations whatsoever. They're not related matters.

23 The only thing that could be construed to be related
24 is this potential -- or I should say, as alleged in the
25 Indictment, joint membership in a criminal enterprise. That's

1 the allegation.

2 All I can tell you, Your Honor, is that, given my
3 representation of Mr. Garcia being at least in 2006, I no
4 longer have a hard copy of that file. My practice is they're
5 all shredded at the five-year mark. I now back them up,
6 including discovery. I mean, they're all scanned. I didn't do
7 that back then.

8 I have no information about Mr. Chris Garcia's case,
9 but I can tell you that when I was provided with the sentencing
10 memorandum, that one of the arguments made by then-A.U.S.A.,
11 now United States Magistrate Judge Greg Fouratt, that there was
12 an allegation in the sentencing memorandum that Mr. Garcia was
13 a member of a prison gang.

14 Now, I can tell you -- and again, I don't have a
15 sentencing transcript before Judge Parker, but there was no --
16 on my recollection, there was no discovery whatsoever of that
17 in the felon-in-possession case. I objected at the time of the
18 sentencing that the person that they were going to call or did
19 call I couldn't cross-examine because there were no documents
20 that were ever produced that substantiated that, and it's my
21 recollection that Judge Parker then discounted that, said he
22 wasn't going to consider that allegation. I heard it as an
23 allegation. I never saw any proof. Having said that, I don't
24 believe a conflict exists.

25 Number two, under the scenario of the Government in

1 their sealed pleading, the idea of theoretically if Mr. Garcia
2 were to testify and I were to cross-examine him, I still -- and
3 as we've argued, there's nothing in my representation that
4 could be used to his detriment or to my current client,
5 Mr. Martinez's detriment. But if that theoretical conflict
6 exists, Mr. Lane is completely conflict-free and could handle
7 that cross-examination.

8 Finally, on the waiver question, Your Honor, and I
9 want Mr. Lane to follow-up on this, obviously, if a conflict
10 doesn't exist, there's no waiver. If it does, it can be waived
11 if Mr. Garcia waives -- I mean, I think he has an interest --
12 as well as Mr. Eugene Martinez.

13 Your Honor, on this part, I disclosed on my very
14 first attorney visit with Mr. Martinez that I had represented
15 Mr. Garcia. I told him, "I don't think that's an issue." He
16 represented to me that he wanted me as his lawyer, along with
17 Mr. Lane, but now I'm not arguing to the Court that that's a
18 knowing waiver when Mr. Lane and I have said we have grounds to
19 believe that Mr. Eugene Martinez has a competency issue yet to
20 be resolved by the Court.

21 So my argument would be for the Court to make a
22 finding that there is no conflict.

23 Next, if there is, Mr. Lane -- if there's a
24 theoretical conflict, Mr. Lane would cross-examine Mr. Garcia
25 if he chose to testify.

1 And, finally, Your Honor, if we get to waiver
2 questions, I'm going to be asking the Court that you withhold
3 that until -- until and if Mr. Eugene Martinez is ruled
4 competent where he could undergo that.

5 Lastly, if he's not competent to proceed, Your Honor,
6 I've given a lot of thought to this and I know I've spoken at
7 length with Mr. Martinez's -- well, both with him in my visits
8 with him and with his wife, as well -- I understand that there
9 is a desire that I continue on this, and particularly if he's
10 found incompetent. I have litigated extensively before Judge
11 Johnson a case involving multiple competency hearings, multiple
12 hearings having to do with an attempt at restoration. This got
13 briefed up to the Tenth Circuit on another issue, and when he
14 was found incompetent, I then have experience in defending
15 allegations of a civil commitment based on future
16 dangerousness.

17 Not many people, I don't -- in New Mexico, I don't
18 think have that experience that could theoretically ripen into
19 the needs of Mr. Eugene Martinez here.

20 THE COURT: They rarely get that far, do they?

21 MR. GORENCE: What's that, Your Honor?

22 THE COURT: They rarely get that far, do they?

23 MR. GORENCE: They rarely do. And it's a very
24 special -- and I'm not -- I'm sure Mr. Lane does, as well, and
25 at that point, obviously, the Government would not be seeking a

1 sentence of death if he's incompetent.

2 But, I'm just saying, that case in front of Judge
3 Johnson, it was also a C.J.A. case, that young man was a Native
4 American. Those proceedings lasted approximately two years.
5 He underwent three different evaluations, and I know that he
6 spent substantial time in various -- I mean, actually, that's
7 why I knew him, he was sent to Springfield, Devon,
8 Massachusetts, and Butner, and we had multiple hearings dealing
9 with an attempt at restoration, and ultimately a hearing on,
10 you know, an attempt by the Government to civilly commit him
11 for an indefinite period of time.

12 And all I'm saying is that it's by virtue of that,
13 that I believe Mr. Martinez's wife has said, "We want you to
14 continue." And if Mr. Martinez is -- Again, I'm not in a
15 position to say what his wishes are, because I don't believe he
16 has the capacity to do that.

17 If you have any other questions factually, Your
18 Honor, I'd be happy to address them. I do think Mr. Lane -- I
19 would like him to address the Court, as well. We've discussed
20 this, obviously, in anticipation of this hearing.

21 THE COURT: One question. You had identified at
22 least the potential, and you raised this with Mr. Martinez at
23 an early stage after you were appointed?

24 MR. GORENCE: After I was appointed, my very -- my
25 very first contact with him --

1 THE COURT: Okay.

2 MR. GORENCE: -- in custody I told him that I had
3 previously -- and actually, all I did was pulled a docket sheet
4 so I could tell him what the dates were and when the case
5 ended.

6 THE COURT: Okay.

7 MR. GORENCE: And I didn't go over the model rule
8 with Mr. Martinez, but I had at that point, as I said,
9 consulted my partner, the other lawyer in my firm, and two
10 other prominent attorneys, including one who had served on our
11 State Supreme Court, and we talked about things, and that was
12 the basis for my going forward.

13 THE COURT: Okay. And I didn't mention -- I did get
14 your response, Mr. Gorence, that's document 319, and I will
15 say, probably somewhat redundantly, that since this arose, or
16 maybe it was shortly before I issued my order to show cause, I
17 did find sufficient reason to believe that Mr. Martinez was
18 incompetent such that he should be committed to the custody of
19 the Attorney General for a period of four months under the
20 statute for treatment toward competence. So I just wanted to
21 make that clarification.

22 So Mr. Martinez is here only because he just has not
23 been transported to the Bureau of Prisons at this point. But
24 we did make arrangements that he would not be transported so
25 that he would be here, understanding that at least at this

1 point he remains, presumably, incompetent to stand trial and to
2 proceed.

3 MR. GORENCE: Yes. And I understand that, Your
4 Honor. But I guess there is an issue that I talked about with
5 Ms. Armijo at the conclusion of the order -- your order
6 regarding discovery and when we addressed competency --

7 THE COURT: Right.

8 MR. GORENCE: -- and you made the finding. It was my
9 understanding, and I think it's Ms. Armijo's, that this first
10 evaluation is to determine competency and that the Court has a
11 substantial basis to order that, much like Mr. Lane and I did
12 by virtue of a competency evaluation that was performed
13 slightly more than two years ago --

14 THE COURT: Right.

15 MR. GORENCE: -- in a finding by a state court judge.
16 If it's -- If you're making a finding he is incompetent and
17 this four-month period of time is for restoration, I'm not sure
18 if we have to modify the order. I'll let Ms. Armijo -- That's
19 actually not part of this first hearing, Your Honor, and we can
20 deal with that later.

21 THE COURT: Let's park that for the time being. In
22 the meantime, Mr. Lane, I'll hear from you, sir. This is the
23 Government's response, but I'm sort of proceeding because this
24 was the Court's order to show cause, giving Mr. Gorence and
25 Mr. Lane first opportunity to make argument.

1 Mr. Lane.

2 MR. LANE: Thank you very much, Your Honor. My
3 position is very much like Mr. Gorence's position, and that is
4 that it is a theoretical conflict, and as such I don't know
5 that there's an actual conflict. The law is fairly clear on
6 this point. I think Mr. Gorence briefed it pretty well.

7 My only position on all of this is, nothing
8 Mr. Martinez has said in the past should be relevant in any
9 way, shape or form to this Court's decision. The fact that
10 Mr. Martinez has indicated a desire to have Mr. Gorence on the
11 case is nice and gives you a warm feeling inside, but it's not
12 legally relevant while the issue of competency is pending.

13 And as Mr. Gorence said, if this Court does find a
14 conflict, that is a waivable conflict, but it's only waivable
15 by competent defendants, and both defendants have to be
16 competent in order to waive it. So at this moment, if there is
17 a conflict, there can be no waiver by Mr. Martinez, because
18 he's not competent to execute a waiver.

19 Other than that, Your Honor, I stand by what
20 Mr. Gorence said. I think it's a hypothetical, theoretical
21 conflict, but the actuality of it is such that I have no
22 conflict, and I think Mr. Gorence having no real recollection
23 of Mr. Garcia's case and having no files to rely on or look at,
24 I think it's merely a theoretical conflict.

25 THE COURT: Mr. Lane, so suppose that we would

1 exercise that option and allow you and Mr. Gorence to remain on
2 the case and you would be the one conducting any
3 cross-examination that you both deem necessary and appropriate
4 on behalf of your client. How would you reconcile or, I guess
5 stated another way, how would you arm yourself for
6 cross-examination in order --

7 MR. LANE: Your Honor, I would arm myself for
8 cross-examination by looking at all the records in discovery
9 that the Government has provided me with. You know, it's
10 pretty straightforward. Impeaching someone with felony
11 convictions -- And the Government will be providing us with
12 everybody's criminal history if they have not already done so.
13 I think they may have already done so.

14 You know, and any kind of investigation that I would
15 undertake independent of discovery would be also independent of
16 Mr. Gorence, and I would simply have an investigator go out and
17 do a full investigation of the codefendant and fill me in on
18 anything he discovered.

19 THE COURT: So --

20 MR. LANE: It would be a normal investigation done
21 independently of Mr. Gorence.

22 THE COURT: Yes. Okay. That's -- I can see how that
23 would at least be your first step. Though, would you agree,
24 though, to be completely or at least sufficiently effective in
25 representing Mr. Martinez, could you speak to the duty you

1 would have to pursue any additional avenues or sources of
2 information in order to arm yourself completely for
3 cross-examination, including consulting with co-counsel?

4 MR. LANE: Well, the way I view this, I have an
5 absolute duty to represent Mr. Martinez to the best of my
6 ability, to do as much investigating as I possibly can, but in
7 36 years of practicing law, I don't recall ever talking to the
8 former criminal defense attorney representing someone who I was
9 going to be impeaching on the witness stand and asking that
10 person for information about their former client, because I
11 would expect every lawyer in America to give me the same
12 response, and that would be, "That's attorney-client privilege,
13 I'm not talking to you about my former client." So I've never
14 approached another lawyer about that, nor would I independently
15 approach Mr. Gorence about his prior representations, because I
16 know I would get that same answer.

17 So I would use independent sources to investigate his
18 former client, and I would not talk to Mr. Gorence about, you
19 know, any aspect of his prior representation.

20 THE COURT: Okay. So that would be in a scenario
21 where you would just consult with -- that you would not feel a
22 need to consult with prior defense counsel. But this case is
23 unique and this circumstances is somewhat different in that
24 prior defense counsel would happen to be your current
25 co-counsel, both of you owing a duty to represent Mr. Martinez

1 effectively. So can you speak to that?

2 MR. LANE: Well, yes. I mean, I think part of having
3 two lawyers on a case is -- there is a division of labor, and
4 the division of labor frequently includes dividing a case up
5 into penalty phase versus guilty/innocence phase. And the two
6 lawyers, while they are, in fact, on the team together,
7 frequently work independently of one another putting together
8 their perspectives and their specific parts of the case.

9 So, because, you know, doing a routine investigation
10 on a codefendant who may testify against my client and
11 preparing a cross-examination is generally not the kind of
12 thing that is so complex and difficult that I would need to
13 consult with co-counsel before I undertook an investigation of
14 this person's character, background, history, criminal record,
15 things of that nature. That is something that defense
16 attorneys routinely do, and I feel that with 36 years of
17 experience doing federal death-penalty cases and criminal
18 defense generally, I really -- I could handle that without
19 necessarily talking to Mr. Gorence about how to go about
20 preparing a case for cross-examining a codefendant.

21 THE COURT: All right. Thank you, Mr. Lane.

22 Ms. Sirignano.

23 MS. SIRIGNANO: Yes, Your Honor.

24 THE COURT: Where is your client on this issue?

25 MS. SIRIGNANO: Mr. Garcia has advised me that he's

1 prepared to waive any conflict at this time.

2 THE COURT: Okay. Okay. All right.

3 MR. LANE: I didn't hear that, Your Honor. I'm
4 sorry.

5 MS. SIRIGNANO: Oh, I'm sorry. Mr. Garcia's advised
6 me that he's prepared to waive.

7 MR. LANE: I still can't hear.

8 MS. SIRIGNANO: If there is a conflict, he's prepared
9 to waive it.

10 Thank you. Oh, thank you. It's green now.

11 Mr. Garcia will waive any conflict at this time.

12 THE COURT: Okay. All right. Let me hear from
13 Ms. Armijo.

14 MS. ARMIJO: Your Honor, I think this case is a
15 little bit different from other cases as far as evaluating
16 whether or not there is a conflict, and it's not necessarily
17 our position that there is an actual conflict now, but there is
18 certainly a potential conflict, and as provided in the case
19 law, it's one that the courts should consider whether or not
20 waivers may be obtained, and even if people -- the defendants
21 want to waive it, it's not certain that the Court would
22 necessarily have to accept those waivers.

23 Now, the reason I say this case is different, because
24 this is a racketeering case, and they are joined in the same
25 criminal organization as alleged. And hypothetically -- And I

1 think I need to speak to a couple different things there.

2 If this were to go to trial and Mr. Martinez and
3 Mr. Garcia were to take this case to trial, one of the
4 racketeering activities that we would probably seek to show in
5 talking about SNM would be Mr. Garcia's activities in regard to
6 distribution of drugs. And to that extent he is charged in
7 another case which is pending before the Court, and I have it
8 as Exhibit Number 3, part of the transcripts, and we would be
9 playing these transcripts, and right there in the transcript
10 Mr. Garcia refers to Bob Gorence is his attorney.

11 Now, based upon what it sounds like, he could be
12 referring to him as his previous attorney, but that's also
13 important, because Mr. Gorence represented him not only for a
14 felon-in-possession case, but also for a trafficking case,
15 which, again, we would be arguing that those were racketeering
16 activities, especially the drug conviction way back when.

17 We also have an instance which we know by court
18 records that Mr. Gorence cross-examined a correctional officer
19 on the issue of Mr. Garcia being an SNM member. Now,
20 Mr. Gorence's claim of "I didn't receive any paperwork or
21 anything else," it still is hard to believe that he would
22 conduct a cross-examination without talking to his client about
23 SNM and any ties to the SNM, given that he effectively,
24 obviously, cross-examined an expert in this area.

25 Now, another thing for the Court to consider -- So,

1 if that were to go to trial, we would have the jury listening
2 to Mr. Garcia's undercover tape talking about Bob Gorence and
3 Bob Gorence sitting at counsel table with another defendant.

4 Another thing that's important to realize is that I
5 think in -- I don't think this is any surprise to Mr. Garcia,
6 in fact, I know that I've told his attorney this, but we are
7 seeking further charges on him which include
8 felon-in-possession charges, which, obviously, his priors come
9 into play. Again, Mr. Gorence representing him on his two most
10 recent priors. No telling if he is going to -- if that were to
11 proceed to trial, if he were to agree that he is a felon or if
12 we would have to prove them up, which is not uncommon. I had
13 to prove up priors in my last felon-in-possession trial.

14 Another thing for the Court to consider is that what
15 he is referring to, the prior that Mr. Gorence represented him
16 on was a felon-in-possession case, and when he was arrested --
17 and this would have been discovery that Mr. Gorence had -- he
18 indicated that he had a firearm because he was protecting
19 himself because he was shot at, he was the victim of a
20 shooting. Now, that relates to the transcript, Exhibit
21 Number 3, where he talks about that shooting, and he talks
22 about the person that shot him, whose name is Shane Dix, and
23 that's on page 869, is what it's labeled as, Government's
24 Exhibit 3.

25 And the reason that is important is because

1 Mr. Garcia is the suspect in this homicide, and the United
2 States is actively looking at possibly charging Mr. Garcia in
3 that case. He is a very strong -- Mr. Dix is dead now, and
4 Mr. Garcia is the -- is a suspect in that murder.

5 So I say all that because it is all relevant to SNM.
6 It is something that even if he wasn't charged we would be
7 seeking to have him brought in. It's something that was
8 relevant and very -- at the time that Mr. Gorence was
9 representing him, because he was carrying a gun, by his own
10 admissions, because he was shot at, and the person that shot at
11 him is later killed.

12 THE COURT: Just for context of Exhibit 3, which you
13 just referenced, in which Mr. Dix is mentioned --

14 MS. ARMIJO: Yes.

15 THE COURT: -- when was that recording?

16 MS. ARMIJO: It is U.S. versus Christopher Garcia,
17 and it's 869, is the Bates stamp, and what I have attached is
18 what -- actually, it was disclosed on Friday. Mr. Aoki has it.

19 THE COURT: When was the phone call recorded?

20 MS. ARMIJO: The phone call was recorded during the
21 undercover operations, which -- I don't have the drug case with
22 me. It would have been in -- That was during a
23 person-to-person buy that was -- that was captured by
24 recordings that is charged in his other case, and I believe the
25 dates -- I'm sorry, I don't have that file in front of me, but

1 are captured in his Indictment. So it would have been in the
2 fall of 2015 --

3 THE COURT: Okay.

4 MS. ARMIJO: -- is the date of that. So we have that
5 issue, as well.

6 Now, as for the learned counsel and having two
7 attorneys, as the Court knows, the United States is -- has
8 already indicated that this has gone past committee, that no
9 mitigation was requested. I don't know if the Court has
10 decided yet if the Attorney General signs off on a no-seek if
11 all of the people that were previously death-eligible, if they
12 will still have learned counsel, because at that point they
13 will not be death-eligible.

14 THE COURT: I haven't made that decision.

15 MS. ARMIJO: Certainly, should the Court make that
16 decision and should learned counsel no longer be involved in
17 the case, that still leaves us with Mr. Martinez having just
18 one attorney, potentially Mr. Gorence, and so that issue of
19 Mr. Gorence being able to be fire-walled, so to speak, would go
20 away.

21 So, as we indicated previously, we saw this as an
22 issue the day that the Court order came out. That same
23 afternoon, Mr. Castellano and I made a call to Mr. Gorence in
24 an attempt to prevent him from talking to Mr. Martinez, and he
25 indicated at that time that he felt he did not have a conflict,

1 but we have always been aware of this situation.

2 THE COURT: Well, Ms. Sirignano.

3 Thank you, Ms. Armijo.

4 MS. SIRIGNANO: Thank you, Your Honor. Just briefly.

5 I understand what the Government is arguing, but I
6 don't have any discovery about that. Everything that she
7 talked about today regarding page 869, Government's Exhibit 3,
8 my client's been in custody since the beginning of December,
9 and I have 48 pages of discovery. I have a discovery letter
10 that went up to defense expert counsel, but that's all I have.
11 I have nothing related to Shane Dix, I have nothing related to
12 his prior representation by Mr. Gorence, I have nothing related
13 to his alleged SNM membership or -- and I was told this morning
14 that Indictment was possibly going to be superseded with
15 felon-in-possession charges.

16 So our position is, is I don't even have an
17 opportunity to respond to these factual allegations at this
18 point because I don't have any discovery.

19 THE COURT: Well, let me -- Did you -- Do you have
20 the United States's sealed ex parte motion document 306?

21 MS. SIRIGNANO: I do. I got it -- That's all I have,
22 is the two pages here, which was taken out of context, in that
23 entire conversation.

24 THE COURT: Okay. Well, I could tell you, for
25 purposes of this hearing, this is all I'm considering. I'm not

1 considering anything that perhaps may be in discovery.

2 As to the question that is now before me, which is
3 whether there is a conflict, either actual or potential, such
4 that counsel should remain or should not remain on the case,
5 that's the limited scope of this hearing. So, as far as
6 hearing any argument based on additional discovery, from my
7 view, I don't see that altogether necessary, as long as you
8 have what is before me, which is attached to document 306.

9 MS. SIRIGNANO: Yes. And my point, Your Honor, was,
10 is that what the Government just argued about Mr. Dix, being
11 under investigation for the homicide of Mr. Dix, his prior
12 record, Mr. Gorence's representation --

13 THE COURT: Okay.

14 MS. SIRIGNANO: -- especially the Dix homicide and
15 additional charges, that's not contained in this ex parte
16 motion. And I just want to put that on the record and bring
17 that to the Court's attention.

18 THE COURT: Okay.

19 MS. SIRIGNANO: Thank you, Your Honor.

20 THE COURT: All right.

21 MR. GORENCE: I just have to rebut, Your Honor, three
22 points.

23 THE COURT: Sure.

24 MR. GORENCE: One, the idea that if a sentence of
25 death is ultimately not being sought by the Government, I can

1 most assuredly tell you that if Mr. Eugene Martinez is found
2 competent with his IQ of 51 having been tested previously, but
3 assuming he is, there will be a request that Mr. Lane continue
4 as co- -- or I continue as co-counsel, he's still learned
5 counsel, even though death isn't being sought, for the reason
6 that this will be a very challenging defense, carrying
7 mandatory life imprisonment for someone as severely mentally
8 handicapped as Mr. Martinez.

9 If anything, if the Government -- or if the Court
10 sees fit, Mr. Lane -- I could be the one discharged after the
11 Government, assuming Attorney General Lynch certifies that the
12 case isn't -- That's always a possibility, as well. That
13 handles that, and the Court could certainly do that.

14 I think, as I said, but this is a case that,
15 uniquely, would require -- or I would suggest the Court would
16 permit two lawyers with someone as -- even if he crosses the
17 competency hurdle, someone who's severely mentally handicapped
18 as Mr. Martinez.

19 Number two, Exhibit 2 on the Government's sealed
20 pleading on 306 --

21 THE COURT: Yes.

22 MR. GORENCE: -- and again, I had suggested and I
23 thought they were going to obtain a transcript before Judge
24 Parker. I didn't see fit to order it. I thought they would.
25 The minute sheet, Your Honor, and it says specifically they

1 called a corrections officer from Central New Mexico
2 Correctional Facility. He testified about gangs in the prison.

3 My cross-examination, according to -- alleged
4 cross-examination, it started at 2:30, I requested to review
5 the records that Mr. Sedillo is referring to, if not this
6 testimony be stricken. The Government states that they were
7 not going to produce those records, is what it says, in
8 essence, because they're not public records and contain highly
9 sensitive information.

10 It's my recollection, at that point, I didn't conduct
11 the cross-examination of that gentleman, because Judge Parker
12 said he wasn't taking it into effect. So it's actually a
13 misrepresentation that I engaged in cross-examination of
14 someone about gang membership.

15 And then, finally, Your Honor, just even on their
16 line sheet from a call that ostensibly -- again, the Government
17 hasn't identified the date with particularity, but if it was
18 sometime in the fall of 2015, as you see on page 2 of 2, it
19 looks like -- I guess it's a back-handed compliment, because
20 Mr. Garcia says, talk to -- makes it look like he's referring
21 to me as a lawyer. That's all it is. He said, "talk
22 to...anybody, talk to Bob Gorence? That's my attorney." It's
23 not clear that it's -- I clearly didn't represent him in
24 November or anytime in the fall of 2015. All this looks like
25 is someone saying, in a context of what I'm provided in the

1 line sheet, is Mr. Garcia making a -- in essence, a referral.
2 I don't see how that even if played for a jury constitutes -- I
3 mean, one, it could be -- my name could be stricken from
4 anything played. That's an easy way to remedy that. Or even
5 if it's played, I don't see how that creates any kind of a
6 conflict, if they listen to it. It's just a referral from one
7 individual to someone who Mr. Garcia suggests needs a lawyer.
8 That's it.

9 And those are just my factual responses to what
10 Ms. Armijo said.

11 THE COURT: Okay. Thank you, Mr. Gorence.

12 It is helpful to know that Mr. Garcia is willing to
13 waive his right to conflict-free representation. Obviously,
14 there's two sides to a waiver under these circumstances, and I
15 couldn't -- I could not even engage Mr. Martinez in a colloquy
16 because of where we currently are with him and the question as
17 to competence.

18 Let me just make some specific references here.
19 Under the Sixth Amendment of the Constitution, criminal
20 defendants have the right to effective assistance of counsel.
21 All right. The Sixth Amendment does not guarantee that a
22 defendant will inexorably be represented by the lawyer whom he
23 prefers or that the defendant has the right to be represented
24 by an attorney laboring under a conflict of interest. Here,
25 I'm citing United States versus Evanson, 584 F.3d 904. That's

1 a 2009 Tenth Circuit case.

2 Now, even without regard to the motion from the
3 United States that was filed, the Court has an obligation to
4 pursue independently -- or an independent interest ensuring
5 that the criminal trials are conducted within appropriate
6 standards of the profession and that legal proceedings appear
7 fair to all who observe them. A conflict can be either actual
8 or potential. And Mr. Gorence and Mr. Lane have referred to
9 the theoretical aspects of the representation. Here, I would
10 couch it more in terms of potential.

11 An actual conflict, as we all know, occurs when
12 counsel is actively representing conflicting interests which
13 have an adverse effect on specific aspects of counsel's
14 performance. And there I'm citing the -- what should be very
15 familiar, Cuyler versus Sullivan, 446 U.S. 335 at 348. If a
16 conflict turns out to be actual and severe, the Court must
17 disqualify the attorney even if the defendant is willing to
18 waive the conflict.

19 Now, when a potential conflict exists, the defendant
20 may waive the right to conflict-free counsel if he does so
21 knowingly and intelligently. And here just citing United
22 States versus Perez, 325 F.3d 115, 125 through 126. That's a
23 2003 Second Circuit case.

24 Even assuming a defendant validly waives a conflict,
25 the district court is still allowed substantial latitude in

1 refusing waivers of conflicts of interest. And here I'm citing
2 United States versus Hunt, 62 F. Appendix 272, that's Tenth
3 Circuit, quoting Wheat versus United States, 486 United States
4 153.

5 Mr. Garcia, I'll reiterate, has agreed to waive his
6 conflict. I cannot inquire or certainly accept any waiver that
7 Mr. Martinez would express because of the current posture and
8 the question as to his competence; however, even were I to
9 engage in a colloquy with Mr. Martinez, and even with
10 Mr. Garcia, given the circumstances in this case and the prior
11 state case where Mr. Gorence represented Mr. Garcia as well as
12 the prior federal case where Mr. Gorence represented
13 Mr. Garcia, I would not accept Mr. Martinez's waiver.

14 So, potential conflicts of interest can become actual
15 conflicts of interest later in the course of litigation and
16 certainly in the course of trial. So a district court may
17 refuse a waiver when a potential conflict exists, which may or
18 may not burgeon into an actual conflict as the trial
19 progresses. Here, I'm citing Wheat at 163.

20 In this particular case, I see potential conflict of
21 interest burgeoning into actual conflict in the following ways.
22 First, Mr. Gorence may not realize it even now or be able to
23 identify it now, but he may have information obtained from his
24 prior representation of Mr. Garcia that is relevant to
25 Mr. Martinez's case and could be quite helpful to

1 Mr. Martinez's case.

2 In the event that Mr. Garcia cooperates, and there's
3 no indication there whether that's even possible at this point,
4 but if in the event he decides to, Mr. Gorence, and even
5 Mr. Lane, I would say, could use the information that
6 Mr. Gorence obtained from the prior representation of
7 Mr. Garcia in order to effectively represent Mr. Martinez in
8 cross-examining Mr. Garcia at trial.

9 In addition, even if Mr. Garcia decides not to
10 cooperate, but if he chose to testify on his own behalf, which
11 certainly is his own right, Mr. Gorence or Mr. Lane could use,
12 nevertheless, the information obtained from prior
13 representation of Mr. Garcia in order to effectively represent
14 Mr. Martinez in cross-examining Mr. Garcia.

15 Still another example could be Mr. Garcia's -- excuse
16 me -- Mr. Gorence's continued representation of Mr. Martinez
17 could have a chilling effect on Mr. Garcia in that Mr. Garcia
18 will know more specifically, perhaps, than anyone, what
19 information Mr. Gorence may have gained from prior
20 representation, and still Mr. Gorence may use the information
21 from his prior representation of Mr. Garcia in conducting his
22 investigation, even in a pretrial context, to effectively
23 prepare and represent Mr. Martinez in this particular case.

24 It presents somewhat of a Catch-22 situation. If
25 Mr. Martinez chooses to testify on his own behalf, Mr. Gorence

1 could potentially be restricted in his examination of
2 Mr. Martinez due to attorney-client obligations to Mr. Garcia,
3 or Mr. Gorence could assist Mr. Martinez, but then violate his
4 attorney-client obligations to Mr. Garcia. These are all
5 potential.

6 I would agree somewhat with Mr. Gorence, that there
7 may not be an actual, I'll accept that at face value. To the
8 extent that these are more than theoretical, these are within
9 the scope of what I think is potential to actually result in an
10 actual at the given time, which could be in a pretrial context
11 or even in a trial context.

12 It's an untenable situation that could very easily
13 result in a violation of Mr. Martinez's right to effective
14 assistance of counsel and to an unfair trial in violation of
15 due process.

16 Regardless of the waiver that Mr. Garcia has tendered
17 or even to the extent that Mr. Martinez was competent in order
18 to waive, I feel, Mr. Gorence, obligated to disqualify you from
19 representing Mr. Martinez in this particular case.

20 Let me add that Mr. Gorence accepted appointment in
21 this case because I called him. There was a need to substitute
22 counsel for Mr. Martinez. Mr. Gorence was available, and
23 although he has a very busy practice, he accepted
24 representation. So let me say that I appreciate that he
25 stepped in to accept appointment at my request and his

1 willingness to continue representing Mr. Martinez.

2 Under the circumstances, however, Mr. Gorence, I will
3 have to disqualify you from further representing Mr. Martinez.

4 Speaking to Mr. Lane, I don't know at this point what
5 the Attorney General's decision will be. There is some
6 expectation to what her decision will be. What I decide with
7 regard to whether you will remain on the case, we'll just have
8 to cross that bridge when we get there. In the meantime,
9 though, I will be -- I'll be appointing new counsel, new C.J.A.
10 counsel to represent Mr. Martinez.

11 MR. LANE: Would Your Honor, not necessarily right
12 now --

13 THE COURT: Let me just say for the record -- Let me
14 just say for the record what I am relying on.

15 Obviously, I heard -- listened very carefully to
16 Mr. Gorence, to Ms. Sirignano, to Ms. Armijo. I did have a
17 chance to review the record that's available from the prior
18 state case, which are attached to the Government's motion,
19 including the minutes that does reference cross-examination by
20 Mr. Gorence. Now, I'll take notice that it was only at most 15
21 minutes, substantially part of that time was used to review
22 records that Mr. Gorence perhaps did not have available to him
23 at that particular time.

24 I would say, though, there is additional items on the
25 record from that federal case, and that was a sentencing

1 memorandum that was filed by the A.U.S.A. Mr. Gorence is
2 correct, it was at that time Assistant U.S. Attorney Greg
3 Fouratt. I'm looking at the docket number for that particular
4 item.

5 MS. ARMIJO: Your Honor, it's in that -- it's
6 document 20 in 06-CR-1347, and it's also document 306-1 in the
7 case that we are before you.

8 THE COURT: And I see document 19 in 06-CR-1347, a
9 sentencing memorandum by the U.S.A. in support of sentence at
10 high end of sentencing guideline range, which does reference
11 alleged gang activity that was tendered to Judge Parker for
12 purposes of sentencing.

13 So, there, I believe, is overlap, crossover, if you
14 will, between this case, which does include very serious
15 allegations relating to racketeering and alleged gang activity
16 and what arose in the previous federal case.

17 So those are my findings. And I'll put that in an
18 order and get that entered in due course.

19 Anything else, Mr. Gorence?

20 MR. GORENCE: No, Your Honor.

21 THE COURT: Okay. Thank you.

22 Ms. Sirignano.

23 MS. SIRIGNANO: Your Honor, I was just wondering if
24 we could unseal these pleadings. This was filed ex parte. I
25 spoke with the Government, and they have no --

1 MR. LANE: I can't hear, Your Honor.

2 MS. SIRIGNANO: Sorry, Mr. Lane.

3 I was just wondering if we could unseal the
4 pleadings. I spoke with the Government. They don't have any
5 objection other than Exhibit 3, since it's considered
6 confidential material pursuant to our protective order.

7 THE COURT: Ms. Armijo.

8 MS. ARMIJO: That is correct, Your Honor. The reason
9 we filed it sealed and ex parte was simply because of Exhibit
10 Number 3, and it is covered -- actually, it's been disclosed to
11 Mr. Aoki, but I don't know if the defense has received it yet,
12 but it is part of the confidential material.

13 THE COURT: Okay. So that motion to unseal is
14 granted with the exception of Exhibit 3 to the United States's
15 sealed ex parte motion.

16 MS. SIRIGNANO: All the pleadings involving this
17 issue today, right, Your Honor? Is that what you're ordering?

18 THE COURT: Well, that would include the United
19 States's sealed ex parte motion and the response. This was
20 filed by Mr. Gorence.

21 Any objection to unsealing that, Mr. Gorence?

22 MR. GORENCE: Your Honor, I'm no longer on it. I'll
23 defer that to Mr. Lane.

24 THE COURT: Yes, sir. Mr. Lane.

25 MR. LANE: No objection, Your Honor.

1 THE COURT: Okay. And I think that about covers it.

2 MS. SIRIGNANO: Thank you, Your Honor.

3 THE COURT: All right. You're welcome.

4 Okay. Mr. Garcia, Mr. Martinez, we have an order
5 pending to transfer Mr. Martinez into the custody of the
6 Attorney General, and we'll reconvene at the next hearing.

7 Ms. Armijo.

8 MS. ARMIJO: Your Honor, I believe that we still have
9 the issue from Bureau of Prisons.

10 THE COURT: Ah, yes.

11 MS. ARMIJO: And the issue is -- And I think that
12 before Mr. Gorence got off, he is correct, I think that the
13 parties understood him to be going to the Bureau of Prisons for
14 a determination of competency. I don't think we agreed to him
15 being incompetent. However, I think what was cited was the
16 four months to allow him to -- to restore him, but I think we
17 have the cart before the horse, so to speak, and so I
18 believe -- And I've reached out to Mr. Scott, but haven't been
19 able to talk to him, to see exactly what he needs. But if you
20 allow me to, then I can talk to Mr. Lane about what we should
21 do to accomplish what we needed to, which is turn him over to
22 the Attorney General but for a determination of competency, not
23 for restoration. And so if the -- if the Court would prefer, I
24 would engage Mr. Lane and also Mr. Scott to get that
25 accomplished and then present you with a new order.

1 THE COURT: Okay, that would be fine. I think he,
2 Mr. Scott -- Dr. Scott -- he's a lawyer for the Bureau of
3 Prisons, I think.

4 MS. ARMIJO: Right.

5 THE COURT: -- he identified, I think, the issue that
6 we discussed when we were first discussing Mr. Martinez's
7 competence, which was which comes first, the evaluation and the
8 treatment or the treatment, and so -- but in any event, I'll
9 give you a chance to consult with Mr. Lane --

10 MS. ARMIJO: Okay.

11 THE COURT: -- the attorney, and then if you would
12 submit to me a proposed order. When do you think you can do
13 that? I'd like to do that as soon as possible so we know where
14 Mr. Martinez is going to be.

15 MS. ARMIJO: I just don't know Mr. Scott's schedule
16 to confer with him, so I would, at least with the Court's
17 permission, like a week, but we'll try and do it much sooner.

18 THE COURT: Okay. Why don't we try to -- Why don't
19 we get that in by close of business Friday?

20 MS. ARMIJO: All right. And, again --

21 MR. LANE: Mr. Gorence has my cell phone number. I
22 am not at my office, and so Mr. Gorence can give Ms. Armijo my
23 cell phone number and she can contact me that way and we can
24 discuss this.

25 THE COURT: All right. So we'll leave it at that.

1 I'll be looking for a proposed order no later than Friday.

2 MS. ARMIJO: All right. And I just want to point out
3 that Friday is Good Friday, and I still want to talk to
4 Mr. Scott just to make sure that we have it right, and I'm
5 assuming -- if I have problems reaching Mr. Scott, given that
6 it is -- potentially a lot of people are off because it is Holy
7 Week, and especially towards the end of the week, I'll inform
8 the Court, but we'll do our best to get it by the end of the
9 day Friday.

10 THE COURT: Okay. I just don't want to leave it
11 open-ended, so deadlines always help us get to where we need to
12 go.

13 Okay. So that's what we'll do on that particular
14 matter.

15 All right. So we'll be in recess and then I'll take
16 up the matter --

17 MR. LANE: Your Honor, one last -- one last point,
18 and that is -- I just raise this because I have Your Honor's
19 ear at this moment. I don't know how local local counsel has
20 to be, but would Your Honor entertain any suggestions from me
21 as to appointing another Colorado lawyer along with me to
22 represent Mr. Martinez --

23 THE COURT: Well, send me --

24 MR. LANE: -- a former Federal Public Defender who
25 has indicated that she's very experienced at death penalty, as

1 well, who has indicated to me that she would accept an
2 appointment if the Court is at all interested.

3 THE COURT: Okay. Send me your list of names,
4 Mr. Lane. I think what we try to do is stay within the
5 district, but we've had to go down that list fairly
6 exhaustively, but we welcome any other suggestions you have. I
7 can't guarantee that's what I'll do, but I'll welcome your
8 list. Okay?

9 MR. LANE: Sure. I will do that, Your Honor. Thank
10 you very much.

11 THE COURT: You're welcome. Have a good afternoon.

12 We'll be in recess.

13 (Court stood in recess at 2:27 p.m.)
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C-E-R-T-I-F-I-C-A-T E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Danna Schutte Everett, RPR, CCR, CRR, Official Court Reporter for the State of New Mexico, do hereby certify that the foregoing pages constitute a true transcript of proceedings had before the said Court held in the city of Las Cruces, New Mexico, in the matter therein stated.

In testimony whereof, I have hereunto set my hand on this 29th day of March, 2016.

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